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From: Hyde.Tinka@epamail.epa.gov [<mailto:Hyde.Tinka@epamail.epa.gov>]
Sent: Wednesday, February 14, 2007 9:07 AM
To: Endris, Kyle
Cc: Swanson-Wilson.Jodi@epamail.epa.gov; Frey.Bertram@epamail.epa.gov;
Steketee.John@epamail.epa.gov; Kaiser.Steven@epamail.epa.gov
Subject: Re: policy

Kyle - Sorry for the delay in getting back to you, I wanted to double check some issues with HQ. As we discussed last week, the main issue is the variation in disclosure times. Below are our comments:

Generally, the proposed IDEM Audit Policy appears to track EPA's Audit Policy & Small Business Compliance Policy very closely. One exception is the 45 day prompt disclosure deadline which may result in confusion should a disclosure be made to both IDEM and EPA for the same violations, i.e. a disclosure could meet the conditions of IDEM's Audit Policy but not Condition 3 of EPA's Audit Policy. To eliminate the potential for confusion, I recommend that IDEM change the deadline from 45 days to 21 days. If IDEM chooses not to change its proposed deadline to 21 days, then EPA and IDEM will need to discuss how to address potential conflicts to ensure that facilities do not get conflicting decisions on whether their disclosure qualifies under our respective policies. Without such an agreement, EPA could be put in a position of having to decide whether or not to use its enforcement discretion to allow a disclosure made both to IDEM and EPA, which does not meet Condition 3 of EPA's Audit Policy, to, nevertheless, still receive credit under the Audit Policy.

We also evaluated whether there were any potential issues regarding the "Voluntary Discovery" section of your document. In this section their policy states "The violation was identified voluntarily by the Regulated Entity, and not through a legally mandated monitoring or sampling requirement prescribed by an Indiana Environmental Requirement.... For purposes of this Policy, IDEM shall consider an independent third-party environmental compliance audit performed on behalf of either a Regulated Entity or a Small Regulated Entity to be above and beyond "reasonable inquiry" for purposes of identifying and disclosing potential Clean Air Act-related violations to IDEM".

After discussing this topic with staff in the Air Division and ORC, I believe the language in the IDEM policy is broad enough as to not conflict with EPA's policy. EPA does, however, make these decisions on a case-by-case basis as stated in the Audit Policy Interpretive Guidance: Summary of Questions and Answers shown below:

Question: Can violations identified in a required compliance certification accompanying an initial application for a Clean Air Act Title V operating permit be eligible for penalty mitigation under the final Audit Policy?

Answer: Generally no, because discovery of violations in these

circumstances is not considered voluntary in light of the comprehensive Title V requirements to inquire, analyze, and certify as to compliance when applying for a permit. Where an applicant can demonstrate that its

inquiry exceeded its obligations under 40 c.F.R. 70.5, however, EPA may on a case-by-case basis consider the discovery of violations during such

an inquiry to be voluntary and potentially eligible for penalty mitigation under the policy. Where permit application requirements under

other environmental statutes do not impose a similarly comprehensive duty to inquire about, analyze, and report violations; violations discovered pursuant to such permit application requirements may qualify as voluntary discovery and, thus, are potentially eligible for Audit Policy penalty mitigation.

You may want to consider developing similar guidance for your policy. Please let me know if you have any questions regarding these comments.

Tinka G. Hyde

Director

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